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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN HOWARD FARROW,

Defendant and Appellant.

A124568

(Contra Costa County
Super. Ct. No. 050712059)

Defendant John Howard Farrow appeals from his conviction by a jury of commercial burglary and misdemeanor resisting arrest. He challenges the sufficiency of the evidence to support the conviction for resisting arrest and argues that the trial court erred in failing sua sponte to instruct on a defendant's right to resist arrest when the arresting officer is using excessive force. There was ample evidence to support the jury's verdict and the jury was properly instructed. Therefore we shall affirm.

BACKGROUND

Jane McSharry, a bartender at Scores Bar in Concord, testified that on June 13, 2007, she arrived at the bar at approximately 4:15 a.m. to clean the bar. She had just arrived when she heard banging coming from the restaurant next door. "It sounded like furniture hitting the wall, furniture being dragged around or drawers slamming, things like that." It was unusual for someone to be in the restaurant at that hour. When she did not see the owner's car outside the restaurant, she called the police and officers arrived in less than five minutes. While McSharry talked to the dispatcher, she heard footsteps coming toward her in the crawl space in the ceiling. When the police arrived, she showed

them the access points to the attic. As she was describing the sounds she had heard, they all heard footsteps directly above them. The police put a dog into the crawl space and McSharry went to the front door of the bar where she could see across the street. She heard the dog crossing the attic, then she “saw somebody running across the street towards the parking lot of the theater.” She described the man as thin, wearing a hood and jeans.

Officer Chris Souza testified that at approximately 4:45 a.m. on June 13 he responded to the report of a burglary at Scores Bar. When he arrived he spoke with McSharry who told him that “she heard banging which sounded like footsteps, and then—a dragging sound.” Souza also heard a noise “like a bang and then . . . like someone walking on the roof.” Souza and another officer checked the outside of the building and found a ladder at the rear of the premises. The other officer climbed the ladder and Souza went to the crawl space inside the bar. While Souza was examining the crawl space, the other officer informed him that “some ventilation ducts appear to have been removed, that there was a backpack containing some pry tools next to the ventilation ducts, and said it appears as though somebody may have entered the business through the roof.” Souza called additional officers “to establish a perimeter in an attempt to contain the suspect if he were to flee.”

Officer David Sweany testified that he had been a K-9 handler for over 13 years, for which he had extensive training. He uses police dogs to conduct searches outdoors, in buildings and to trail suspects. Sweany’s dog, Spyke, scored 432 out of a possible 440 in his testing as a police dog; a score of over 400 marks a dog as the “cream of the crop.” Sweany testified that Spyke had never bitten a person he should not have bitten. Although Spyke was trained to release a bite on Sweany’s command, if he was biting a suspect who was struggling or resisting, he would not release.

On June 13, 2007, Sweany was on duty with Spyke and was called to Scores Bar to assist in the burglary investigation. Sweany twice yelled into the attic space, “The Concord Police Department. We use a police dog to search this attic. If there’s anybody up here, if you’re up here, make your presence [known]. If the dog finds you or when the

dog finds you might get bit.” He received no response. He then carried Spyke up the ladder and placed him in the crawl space and made the announcement two more times. He still received no response and directed Spyke to bark so that a suspect would know he was not bluffing about having a dog. No one responded and Sweany lifted Spyke from the crawl space into the attic and commanded him to search. The restaurant’s alarm sounded, and Souza heard another officer yell “Stop. Police.” A third officer broadcast “that there was a suspect running through the Brenden Theater’s parking garage from the . . . restaurant.” Sweany recalled Spyke and lifted him down from the attic.

Based on the information he heard on the police radio, Sweany took Spyke to a nearby construction site and instructed the dog to find the suspect. Spyke led Sweany to the southwest corner of the construction site and gave Sweany a proximity alert. Sweany took Spyke off his leash and commanded him to search the area. Spyke “went along the fence line and when he reached . . . the southwest corner . . . [he] reached down [and] bit a piece of cloth, and shook it vigorously.” The cloth turned out to be a black sweatshirt with white markings that Sweany believed to be from sheetrock. Spyke dropped the sweatshirt, turned and ran out of Sweany’s view behind a mound of dirt and gravel. Sweany then heard a man yelling. When Sweany followed the sound, he saw Spyke biting defendant on the knee, about 15 feet from where Spyke had picked up the sweatshirt.

Defendant had “his hands around the dog’s snout. He appeared to be trying to push the dog away from his body.” Souza told defendant to let go of the dog, but defendant did not comply. Souza grabbed defendant’s arm and tried to pull it away from the dog but could not, so he hit defendant in the face twice. “What I was trying to do is get him to cover up his face so that Corporal Sweany [could] remove the dog from his leg and we [could] place him in handcuffs.” Defendant still did not release the dog, so Souza struck defendant two more times. Defendant did not release the dog, but Souza was able to get the dog to release defendant’s leg. Souza attempted to handcuff defendant but he “rolled over and attempted to tuck his arms underneath his body.” Souza again struck defendant twice in the face “in an effort to distract him so he would loosen his arms so

we [could] place him into handcuffs.” The strikes distracted defendant and the officers were able to place him under arrest.

Defendant was charged by information with one count of second degree commercial burglary (Pen. Code,¹ §§ 459, 460, subd. (b)), one count of resisting arrest (§ 148, subd. (a)(1)) and one count of striking a police dog (§ 600, subd. (a).) The information also alleged that defendant had a prior felony strike conviction pursuant to section 667, subdivisions (b) through (i) and that he was ineligible for probation under section 1203, subdivision (e)(4) because he had two prior felony convictions.

A jury found defendant guilty of burglary and resisting arrest, but found he was not guilty of striking a police dog. Defendant waived his right to a jury trial on the prior conviction allegations and the court found true the prior strike allegation. The court imposed a 60-day jail sentence on the second count, a misdemeanor, and credited defendant for 60 days time served. On the burglary conviction, the court sentenced defendant to the low term of one year and four months, doubled to two years and eight months because of the prior conviction. Defendant was given credit for 186 days. Defendant timely noticed this appeal.

DISCUSSION

Defendant presented no evidence at trial and his sole argument to the jury was that the prosecution had not proved that he was the person in the building and guilty of the burglary. He made no argument whatsoever concerning the charge of resisting arrest. On appeal, however, he argues that there was not substantial evidence to support his conviction for resisting arrest. He argues that his flight from the building “may easily have been motivated by his fall or the alarm, and not necessarily in response to the police order”; that he did not refuse to obey Sweany’s command to release the dog but could not do so because the dog was biting him; and that the trial court erred in failing to instruct the jury sua sponte on the use of reasonable force in self defense because there was evidence that Souza used excessive force in arresting him.

¹ All statutory references are to the Penal Code.

“In reviewing appellant’s insufficiency of evidence argument, we ask not whether there is evidence from which the trier of fact could have reached some other conclusion, but whether, viewing the evidence in the light most favorable to respondent, and presuming in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, there is substantial evidence of appellant’s guilt, i.e., evidence that is credible and of solid value, from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Thus, our sole function as a reviewing court in determining the sufficiency of the evidence is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*In re Michael M.* (2001) 86 Cal.App.4th 718, 726, fn. omitted.)

Section 148, subdivision (a) provides: “Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment” is guilty of a misdemeanor. To prove that defendant violated this section, the prosecution must prove that “(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.” (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109.)

Defendant first argues that there was insufficient evidence that he heard Sweany’s announcement that the police were present and that he fled in response to that announcement. He points out that none of the officers observed a person in the crawl space and that there was no evidence that the dog saw him in the crawl space. He contrasts the evidence here with the facts in other cases upholding convictions under section 148.

Defendant cites *People v. Allen* (1980) 109 Cal.App.3d 981. In that case, the police officer observed the defendant and others gathered around the trunk of a car. After the defendant looked in the direction of the police vehicle, he slammed the trunk of the car and hurried away. (*Id.* at p. 983.) The police officer followed in his car and stated that

“ ‘I pulled on through the parking lot to the south side of the business at which time I caught a glimpse of the defendant running at this time southbound on Arthur, at which time numerous subjects were pointing in the same direction, stating that he was running from us.’ ” (*Id.* at p. 984.) The defendant argued that the officer did not have probable cause to arrest him for violating section 148 because he had not clearly announced that defendant was being placed under arrest. The appellate court held that “on the face of the statute it would appear that the physical activity that appellant engaged in, flight and concealment, which delayed the officer’s performance of his official duty, violated the statute.” (*Id.* at pp. 985-986.) Further, the court held that the evidence was sufficient to establish that the defendant knew that police wanted to detain him and that his flight provided probable cause for his arrest for violation of section 148. (*Id.* at p. 987.)

Defendant also relies on a series of cases in which the evidence indicated that the defendant had seen the police before fleeing. In *In re Andre P.* (1991) 226 Cal.App.3d 1164, 1168, the police officer “saw Andre and another juvenile standing in front of a hamburger stand. Andre looked to be about 14 to 16 years old. Deciding to talk to him about an apparent curfew violation, [the officer] alighted from his vehicle. As soon as he exited, Andre started running. [the officer] ran after him, shouting several times, ‘Police Officer. Stop. Stop running.’ ” The juvenile admitted that he had knowingly fled from a police officer and that he heard the admonition. In *In re Lavoyne M.* (1990) 221 Cal.App.3d 154, 157, the court held that a warrantless search of a residence was permissible where the police officer pursued the minor in a car, then followed him on foot into the house after the minor ignored the admonition to “ ‘to hold still right there.’ ” Finally, in *People v. Lopez* (1986) 188 Cal.App.3d 592, 595, the defendant was with two other men when the police identified themselves and ordered the men to stop. The other two halted but the defendant kept walking quickly away. (*Id.* at p. 595.)

Defendant argues that this case is distinguishable because in each of the cited cases “the evidence established without question that the defendants were aware of the officers’ presence and willfully and knowingly fled to avoid the contact. Here however, the evidence did not show that appellant ever saw or heard the police.” However, the

question on appeal is not whether the evidence conclusively established defendant's knowledge, but whether there is "evidence that is credible and of solid value, from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*In re Michael M. supra*, 86 Cal.App.4th at p. 726.) Although the evidence does not lead inexorably to the conclusion that defendant knew the police were present and wished to detain him when he fled from the bar, his flight immediately following Sweany's announcement and the release of the dog into the crawl space, and the announcement by another officer to "Stop. Police," was sufficient for the jury to have made such an inference.

Defendant also argues that the evidence was insufficient to support a conviction for resisting arrest based on the fact that he did not obey Souza's command to release the dog when he was apprehended. Defendant's argument here is similarly flawed. Although the evidence might support a different conclusion—i.e., that defendant *could not* release the dog because the dog was biting his hand—Sweany's testimony that the dog would not release his grip if a suspect was struggling or fighting him was sufficient to support the conclusion that the dog did not release defendant because defendant continued to struggle with the dog.²

² In closing argument, the prosecutor argued that defendant had resisted arrest both by fleeing the bar and by refusing to release the dog, and told the jury, "You don't have to agree upon one or the other. You just all have to agree that he's guilty." Although no objection was made to the prosecutor's statement and the issue is not raised on appeal, the prosecutor's statement is questionable and a unanimity instruction (CALCRIM No. 3500) may have been called for. (See, e.g., *People v. Russo* (2001) 25 Cal.4th 1124, 1132 ["when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act"]; but see, e.g., *People v. Jenkins* (1994) 29 Cal.App.4th 287, 300 [unanimity instruction not required if offense consists of continuous course of conduct].) In all events, the fact that the jury found defendant guilty of the burglary necessarily means that it believed he was in the building and fled after the police warning, so that if a unanimity instruction was appropriate, the failure to give it was harmless beyond a reasonable doubt.

Finally, defendant argues that the trial court erred in not instructing the jury with CALJIC No. 5.30, which states that “It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, that person may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.” Defendant argues that the “instruction would have focused the jury’s attention on the need to consider whether appellant’s actions in rolling onto his stomach and folding his arms under himself were a reasonable means to self defense in light of the considerable force used by Souza”

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.]’ ” (*People v. Middleton* (1997) 52 Cal.App.4th 19, 30, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.) “The court has a sua sponte duty to instruct on defenses when ‘ “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” ’ [Citation.] Yet this duty is limited: ‘the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. [Citation.] Thus, the court is required to instruct sua sponte only on general principles which are necessary for the jury’s understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.” [Citations.] Alternatively expressed, ‘[i]f an instruction relates “particular facts to the elements of the offense charged,” it is a pinpoint instruction and the court does not have a sua sponte duty to instruct.’ ” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489.)

When a defendant is charged with resisting arrest, it is “essential for the jury to be told that if they found the arrest was made with excessive force, the arrest was unlawful and they should find the defendant not guilty of those charges which required the officer to be lawfully engaged in the performance of his duties (§§ 245, subd. (b), 243 and 148).” (*People v. White* (1980) 101 Cal.App.3d 161, 167.) Here, the jury was properly instructed that “If you have a reasonable doubt that the peace officer was . . . using reasonable force in making or attempting to make the arrest or detention and thus have a reasonable doubt that the officer was engaged in the performance of his duties or discharging or attempting to discharge any duty of his, you must find the defendant not guilty of the crimes of Penal Code section 148(a)(1). A peace officer is not permitted to use unreasonable or excessive force in making or attempting to make an otherwise lawful arrest in detaining or attempting to detain a person for questioning. If an officer does use unreasonable or excessive force in making or attempting to make an arrest, in detaining or attempting to detain a person for questioning, the person being arrested or detained may lawful[ly] use reasonable force to protect himself. Thus, if you find that the officer used unreasonable or excessive force in making or attempting to make the arrest . . . and that the defendant used only reasonable force to protect himself, the defendant is not guilty of the crime charged in count 2.”

CALJIC No. 5.30 may have offered a more specific instruction on what constitutes excessive force, but the trial court is not required to give such an instruction sua sponte. The instructions given adequately informed the jury of the general principles that define the crime of resisting arrest and the defense of excessive force. Moreover, the instruction was inconsistent with defendant’s theory of the case, which was solely that he was not the burglar. As the evidence was sufficient to support the conviction based on defendant’s flight from the bar, any failure to further instruct on excessive use of force was harmless.

DISPOSITION

The judgment is affirmed.

Pollak, J.

We concur:

McGuiness, P. J.

Siggins, J.